United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1285

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P/S

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1285

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL F. MEYER, a/k/a WILLIAM BARTLETT, a/k/a JACK FORREST,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Samuel F. Meyer appeals from a judgment of conviction of the Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, filed April 8, 1975, sentencing him to imprisonment and probation after his plea of guilty to six counts of mail fraud.

Indictment S74 Cr. 1182, filed December 18, 1974, in nine counts, charged Meyer, between August 1, 1972 and August 3, 1973, with having devised a scheme to obtain money and property by fraud and having used, or caused the use of, the mails on nine separate occasions to further that scheme in violation of Title 18, United States Code, Section 1341. On January 7, 1975, Meyer entered a plea of guilty to Counts One, Two, Three, Six, Seven and Eight of the indictment. On April 8, 1975, Judge Duffy sentenced

Meyer as follows: five years' imprisonment on Count One and five years' imprisonment on Count Two, the sentences to run consecutively with each other and with a New Jersey sentence Meyer is now serving; and five years' probation on Counts Six, Seven and Eight to be served concurrently following completion of the sentence of imprisonment. On Count Three, the Judge imposed a term of five years' imprisonment concurrent to the sentence on Count One.

On appeal, Meyer seeks review of the sentence imposed by the District Court.

Statement of Facts

The offenses for which Meyer was indicted involved the use of a shell corporation which had no assets or income as a device for defrauding numerous legitimate businesses. Meyer incorporated the shell corporation, Union Mart Corporation, in Delaware on September 27, 1972, and soon thereafter set up shop in a small office on Wall Street. Using a fictitious name, Meyer opened a checking account for Union Mart at the First National City Bank (FNCB). Through phone calls and a confirmatory letter on Union Mart stationery, Meyer obtained blank checks from FNCB without making an opening deposit. The checks were mailed to Union Mart, and within days the Union Mart account was more than $14,000 overdrawn. Most of the money went to Meyer himself. No funds were ever deposited in the Union Mart FNCB account.

When in mid-October 1972 Meyer could no longer draw checks on the FNCB account, he engaged a Wilmington, Delaware answering service to list a number for, and to answer calls directed to, a bogus entity known as American Trust Co. Meyer then began giving American Trust Co. and its purported telephone number as a reference when

seeking credit for Union Mart. When calls were made to the American Trust Co. answering service number, the operator would go through the motions of taking the necessary information so that the call could be returned by an American Trust Co. officer. The operator would then relay the message to Union Mart in New York, and ostensible officers of American Trust Co. would return the call and falsely state that Union Mart was a company with a substantial bank balance. As a result of the false credit rating phase of his scheme, Meyer left numerous businesses holding unpaid bills for goods and services totalling approximately $50,000 and, by use of the mails, attempted to secure additional goods and services.

On January 7, 1975, prior to Meyer's guilty plea, the Government outlined Meyer's scheme. During his plea, Meyer admitted that he had set up Union Mart, that he had opened the account at FNCB and that he had cashed checks drawn on the account without ever putting in any money to cover them (Tr. of Jan. 7, 1975, at 2-10).*

At appellant's sentencing on April 18, 1975, the District Judge, on the basis of a comprehensive pre-sentence report, observed that appellant had shown himself to be totally incorrigible and pointed out that, "Just the list of your former crimes and your former violations of probation and your former failures to accept the opportunities which you had goes on for about seven and a half or eight pages" (Tr. of April 8, 1975, at 11). Judge Duffy then imposed the sentence from which Meyer now appeals.

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* Meyer was advised that the maximum sentence on each count he pleaded guilty to was five years' imprisonment and or a $10,000 fine (Tr. of Jan. 7, 1975, at 8).

ARGUMENT

POINT I

The Offenses Charged in the Six Counts For Which Appellant Stands Convicted Were Separate and Were Neither A Continuing Offense Nor Merged, and Therefore Separate Sentencing Was Proper.

Meyer argues that the six counts of the indictment to which he pled guilty arose out of a single transaction or scheme and therefore the imposition of a separate sentence on each count was improper. The thrust of this argument is that since various included offenses have been held to "merge" in cases arising under the Federal bank robbery statute, 18 U.S.C. § 2113, and the National Firearms Act, 26 U.S.C. § 5861(c), (d) and (f), a similar result should be reached in considering repeated offenses under the Federal mail fraud statute, 18 U.S.C. § 1341. This argument misperceives the basis for the merger cases and is unsupported by any significant authority.

Congressional intent is the critical factor in determining whether separate sentences may be imposed for violations of separate statutory provisions arising out of a single transaction.* Thus, *Sullivan* v. *United States*, 485 F.2d 1352 (5th Cir. 1973), and *United States* v. *Mackey*, 474 F.2d 55 (4th Cir.), *cert. denied*, 412 U.S. 941 (1973), cited by Meyer, are merely extensions of the well-settled teaching that Congress did not intend to pyramid the penalties un-

* Furthermore, it is plain that the concept of a single "transaction" cannot be stretched to include Meyer's scheme, which lasted many months and took in numerous victims. If Meyer's argument were accepted, consecutive sentences under 18 U.S.C. § 2113 could not be imposed, for example, for multiple bank robberies where the robber was grandiose enough to have a "single scheme."

der the Federal bank robbery statute. See *Prince* v. *United States*, 352 U.S. 322 (1957). Similarly, *United States* v. *Clements*, 471 F.2d 1253 (9th Cir. 1972), a firearms case which Meyer also cites, was a case where the result turned on statutory construction. *Id.* at 1254. Since there was no indication on the face of the National Firearms Act that Congress intended to allow multiple punishments for the several offenses generated by a single act of illegally making a firearm, *Clements* held that the imposition of three consecutive ten-year sentences was legally impermissible.

The Federal mail fraud statute, 18 U.S.C. § 1341, is a separate statute with its own legislative and judicial history. Its proper construction obviously cannot be gleaned from authorities pertaining to unrelated statutes and offenses. The purpose of Congress in enacting the mail fraud statute was to punish, not simply fraud, but *use of the mails* for the purpose of executing a fraudulent scheme. *Badders* v. *United States*, 240 U.S. 391, 393-394 (1916). Consequently, it has long been recognized that each mailing in furtherance of a fraudulent scheme constitutes a separate offense. *Badders* v. *United States*, *supra*; *In re Henry*, 123 U.S. 372, 374 (1887); *United States* v. *Mackay*, 491 F.2d 616, 623-24 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974); *United States* v. *Anderson*, 466 F.2d 1360 (8th Cir. 1972); *Mitchell* v. *United States*, 142 F.2d 480 (10th Cir. 1944), *cert. denied*, 323 U.S. 747 (1944); *United States ex rel. Bernstein* v. *Hill*, 71 F.2d 159 (3d Cir. 1934).* Thus, to consider each mailing a separate

* The Federal mail fraud statute has been recodified and amended in minor ways over the years, but Congress has not indicated the slightest disagreement with the holdings of *In re Henry*, *supra*; *Badders* v. *United States*, *supra*, and their progeny. The statute construed in *Badders*, codified as 18 U.S.C. § 338 (1946 ed.), was unchanged until the 1948 recodification of Title 18, when it was renumbered as § 1341 and streamlined by the deletion of anachronistic references to particular frauds such as "sawdust swindles," "green articles," and "green cigars." The recodification did not alter the meaning of the statute. See Reviser's Note to 18 U.S.C. § 1341.

offense is not to create an "arbitrary distinction," as Meyer argues, between mail fraud and other crimes, but to effectuate the longstanding determination of Congress to deter the use of the United States mails for the purpose of perpetrating frauds on the public.*

POINT II

The District Judge Did Not Abuse His Discretion in Imposing Consecutive Sentences.

Meyer argues that the District Judge abused his discretion in imposing a sentence which he contends was excessive and constituted cruel and unusual punishment. This claim is utterly without merit.

It is well-settled that, absent extraordinary circumstances, a Court of Appeals is without power to review a sentence which is within permissible statutory limits. See *United States* v. *Tucker,* 404 U.S. 443, 446-47 (1972); *Gore* v. *United States,* 357 U.S. 386, 393 (1958); *Blockburger* v. *United States,* 284 U.S. 299, 305 (1932); *United States* v. *Brown,* 479 F.2d 1170, 1172 (2d Cir. 1973); *United States* v. *Dawson,* 400 F.2d 194, 200 (2d Cir. 1968); *cert. denied,* 393 U.S. 1023 (1969); *United States* v. *Lo Duca,* 274 F.2d 57, 59 (2d Cir. 1960); *Roth v. United States,* 255 F.2d 440, 441 (2d Cir.), *cert. denied,* 358 U.S. 819 (1958). Appellate review of sentences is limited to rare cases such as those in which a District Court has considered impermissible factors, see *United States* v. *Tucker, supra; Marano* v. *United States,* 374 F.2d 583 (1st Cir. 1967); *United States* v. *Wiley,* 278 F.2d 500 (7th

* Indeed, Meyer candidly acknowledges that his assertion that separate mailings should be treated as a single offense is against the weight of authority in this Circuit. See *United States* v. *Dioguardi,* 492 F.2d 70, 83 (2d Cir.), *cert. denied,* 419 U.S. 873 (1974).

Cir. 1960), or lacked an accurate understanding of the full range of sentencing options. See *United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975); *United States* v. *Wilson*, 450 F.2d 495 (4th Cir. 1971).* No such extraordinary circumstances exist here, and the sentence imposed below should not be disturbed.**

However, even assuming that this Court had power to review the sentence imposed, the District Court did not abuse its discretion in sentencing Meyer as it did. Even assuming *arguendo* that a District Judge should exercise restraint in imposing consecutive sentences for offenses which might be considered part of a single course of conduct, the record in this case amply reflects a sensitive and responsible approach toward sentencing. Meyer's fraud

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* In *United States* v. *West Coast News Co.*, 357 F.2d 855 (6th Cir. 1966), the Court of Appeals expressed an opinion that the sentence of 25 years in an obscenity case was severe but rather than finding an abuse of discretion suggested that the District Court entertain a motion for reduction of sentence under F.R. Crim. P. 35. 357 F.2d at 865. *West Coast News Co.* was later reversed *sub nom.*, *Aday* v. *United States*, 388 U.S. 447 (1967). In *United States* v. *Mackay*, 491 F. 616 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974), on motion for rehearing, the Tenth Circuit, without citing authority, remanded for reconsideration of consecutive one year sentences on each of fifteen counts of a mail fraud indictment on the ground that such a sentence, imposed on defendants with no criminal records, was unconscionably excessive. To the extent that this Court finds these two authorities persuasive, they do not appear to stand for the proposition that an appellate court may review or modify sentences, but only that in exceptional cases the District Court can be called upon to reconsider its exercise of discretionary sentencing authority.

** Meyer's passing claim that he has been subjected to cruel and unusual punishment is frivolous, since the sentence imposed was well within statutory limits. *Badders* v. *United States*, 240 U.S. 391 (1916); *United States* v. *Dawson*, 400 F.2d 194, 200 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *Smith* v. *United States*, 273 F.2d 462, 467-68 (10th Cir. 1959).

was deliberate, lasted many months, and netted substantial sums. The District Court had before it Meyer's criminal record which showed, not merely an incident or two of prior criminal conduct, but a history of repeated similar offenses and violations of probation. Judge Duffy considered Meyer's sentence with great care—indeed, he awoke to ponder it in the night before sentencing (Tr. of April 8, 1975, at 6). He was clearly concerned about Meyer's previous misdeeds, because, as he put it, "I have read the presentence reports of people who are totally incorrigible, but I have got to admit nothing matched this." *Id.* at 11. Meyer's sentence of ten years' imprisonment to be followed by five years, probation was well within the maximum of 30 years which the District Court could legally have imposed. It was certainly within the power of the District Court to combine a substantial term of imprisonment with probation in an attempt to break this defendant away from an established pattern of fraud and dishonesty and to protect society from his present predilection to commit such offenses. *Cf. United States* v. *Smallwood*, 443 F.2d 535, 543-44 (8th Cir.), *cert. denied*, 404 U.S. 853 (1971).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

ARB:bj

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN R. BENTLEY, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of August, 1975 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Frank Metro, Esq.
Second Floor
976 Broad Street
Newark, New Jersey 07102

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing outside of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Allen R. Bentley
ALLEN R. BENTLEY

Sworn to before me this
20th day of August, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977